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No. 90-605

In the Supreme Court of the United States

OCTOBER TERM, 1990

UNITED STATES DEPARTMENT OF TRANSPORTATION, ET AL.,
PETITIONERS

v.

AIR TRANSPORT ASSOCIATION OF AMERICA, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM OF PETITIONERS IN RESPONSE TO RESPONDENTS' SUGGESTION OF MOOTNESS

JOHN G. ROBERTS, JR.
Acting Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

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Respondents have filed a memorandum suggesting that this case is moot. In view of respondents' representation that neither they nor their members have an interest in challenging the validity of the rules at issue in this or any other proceeding, and their expressed willingness to accept an order vacating the court of appeals' judgment and remanding with a direction to dismiss the petition for review *with prejudice*, we agree that the case is now moot.

In this case, acting on respondents' petition for review, the court of appeals invalidated Rules of Practice applicable in civil penalty proceedings conducted by the Federal Aviation Administration (Pet. App. 33a-91a), on the ground that the regulations had not been issued in accordance with the

notice-and-comment requirement of the Administrative Procedure Act, 5 U.S.C. 553(b). The petition for a writ of certiorari sought further review of the question whether the Rules of Practice fell within the exception to that requirement for "rules of agency organization, procedure, or practice" (5 U.S.C. 553(b)(A)).

Following the entry of the court of appeals' judgment, the FAA completed a rulemaking amending the rules in certain respects and, after providing notice and an opportunity for comment, repromulgated the rules in their entirety. See Pet. 7, 21-23. In light of these events, respondents' brief in opposition argued that the case had become moot. ATA Br. in Opp. 1-9. In our reply brief, we argued that because respondents or their members could invoke the court of appeals' judgment in seeking to invalidate penalties assessed in proceedings conducted in some part under the original rules, there was a continuing controversy as to those rules' validity. Reply Br. 2-5. We suggested, however, that representations by the respondents along the lines indicated by *Frank* v. *Minnesota Newspaper Ass'n, Inc.*, 490 U.S. 225 (1989), and *Deakins* v. *Monaghan*, 484 U.S. 193, 199-200 & n.4 (1988), would render the case moot. Reply Br. 6-7. This Court granted certiorari.

Although respondents did not undertake to make such representations prior to this Court's granting the petition for a writ of certiorari, they have now done so in their memorandum suggesting mootness. The respondents have advised the Court that they have no further interest in the court of appeals' judgment; that they no longer seek judicial relief with regard to the original rules; that respondents (and members of those respondents that have pursued this case on behalf of their members) have no interest in challenging the validity of the original rules now or in the future, on grounds advanced in the court of appeals, in individual penalty proceedings conducted in any part under the original

rules or in cases seeking judicial review of penalties assessed in such proceedings; and that respondents do not oppose vacation of the court of appeals' judgment and dismissal of their petition for review with prejudice.

On the basis of those unequivocal representations, we agree that the case is now moot. We emphasize that our position is based, in particular, on respondents' willingness to accept the dismissal of their petition for review *with prejudice*. That was the disposition that this Court directed in *Deakins* v. *Monaghan*, 484 U.S. at 200 & n.4, 204, in a similar situation. As in *Deakins*, a dismissal with prejudice is necessary to protect the government against the possibility that respondents themselves or members of those respondents that have proceeded in a representative capacity could, in some other proceeding, assert the claims raised by the petition for review.

CONCLUSION

The judgment of the court of appeals should be vacated and the case should be remanded to the court of appeals with a direction to dismiss the petition for review with prejudice.

Respectfully submitted.

JOHN G. ROBERTS, JR.
Acting Solicitor General *

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* The Solicitor General is disqualified in this case.

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